SPECIAL CIVIL APPLICATIONS NO. 9602, 9605,
9698, 9699 AND 9700 OF 1996.

Date of decision: 3.4.1997.

For approval and signature

The Honourable Mr. Justice R. R. Jain

Mr. V.B. Patel, Senior Advocate with Mr. Deepak V. Patel and Mr. D.G. Chauhan, advocates for the petitioners in all the petitions.

SCA No. 9602/96

Mr.T.H. Sompura, A.G.P. instructed by M/s.Patel advocates for respondent No.1.
Mrs V. K. Parekh, A.G.P. for respondent No.2, 4 & 5.
Mr. H.S. Munshaw, advocate for respondent No.3.
Respondent No.6 -served.

SCA No. 9605/96

Mr. T.H. Sompura, A.G.P. instructed by M/s.Patel Advocates for respondent No.1.
Mrs. V.K. Parekh, A.G.P. for respondent Nos.2, 4 & 5.
Mr. H.S.Munshaw, advocate for respondent No.3.
Respondents No.6 and 7 - served.

SCA Mos.9698/96 to 9700/96.

Mr. T.H. Sompura, A.G.P. instructed by M/s.Patel advocates for respondent No.1.
Mrs. V.K. Parekh, A.G.P. for respondents No.2, 4 & 5.
Mr. H.S.Munshaw, advocate for respondent No.3.
Respondent No.6 - served by RPAD.

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether their Lordships wish to see the fair copy of judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

Coram: R.R.Jain,J.

April 3, 1997.

Common Oral Judgment:

All these petitions are disposed of by common this judgment since identical questions of law and facts are involved. Except change in Survey Number and names of parties, all the relevant facts and documents are same identical hence for the sake of convenience, relevant documents produced in Special Civil Application No. 9602 of 1996 only are referred to in this judgment hereafter.

Petitioner has approached this Court with a request for issuing writ of prohibition or mandamus or any other appropriate writ, quashing and setting aside the impugned notice dated 14.8.1995, issued under Rule 108 (6) of the Gujarat Land Revenue Rules, 1972 (hereinafter referred to as "the Rules") and restraining the respondent No.2, Collector, City of Rajkot, from taking any action pursuant to the impugned notice, Annexure 'I'.

Briefly stated, the facts giving rise to this case are as under:

The petitioner purchased from respondent No.6, Mansukhbhai Savjibhai Patel, a piece of non-agricultural land bearing Final Plot No. 95 admeasuring 418 sq.mt., by registered sale deed dated 25.3.1991 for consideration of Rs.1,85,500/- The said plot of land is included in the Town Planning Scheme No.1 Raiya - Rajkot for which a declaration was made on 13.7.1978 and ultimately was sanctioned by the Government vide Notification, Annexure 'D', dated 28.6.1990. In pursuance of the said sale transaction, Mutation Entry No. 4725 dated 2.4.1991 was made in the record of rights of village Raiya. The same was also certified by the Mamlatdar, Rajkot, vide certification dated 6.5.1991.

The respondent No.6, predecessor-in-title of the

petitioner, had purchased non-agricultural land bearing Survey No. 88/1 bearing Plot No. 25, admeasuring 694 sq.mt. from Dharamsibhai Vasram Jhaveri under a registered sale deed dated 21.11.1978. The sale transaction in favour of respondent No.6 was also acknowledged by the revenue authorities and necessary entry No. 4347 dated 11.7.1990 was made in the revenue records of village Raiya and certified by Mamlatdar, Rajkot in August 1990.

In the meanwhile, Town Planning Scheme No.1- Raiya-Rajkot came to be framed under the Gujarat Town Planning and Urban Development Act, 1976 (hereinafter referred to as the "Town Planning Act") and ultimately following due procedure of law, the respondent No.1 accorded sanction under Section 65 of the Act and thus the scheme became final. Since the agricultural land bearing Survey No.88/1 Plot No. 25 was included within the Town Planning Scheme, two reconstituted plots i.e., Final Plot No. 19, admeasuring 487 sq.mt. and Final Plot No. 95, admeasuring 418 sq.mt. were allotted to respondent No.6 and necessary entries were made in the relevant record in his favour. Thus, ownership of both the plots stood statutorily transferred in the name of respondent No.6 free from all encumbrances and thus ownership qua the reconstituted final plots was conferred upon respondent No.6. Before handing over possession, the Appropriate Authority under the Town Planning Act also required the respondent No.6 to pay some amount as compensation as provided under Sections 79 and 80 of the Act and the same was paid by him. It is in this background that having become absolute owner of both these reconstituted final plots allotted by the competent authority under the scheme, the respondent No.6 sold one of the plots, namely, final plot No. 95 admeasuring 418 sq.mt., to the present petitioner and thus the present petitioner became owner of the plot.

From the record it transpires that all the above referred facts i.e., original Survey Number, reconstitution of plots and allotment thereof by virtue of the Town Planning Scheme, framing and sanctioning of the Town Planning Scheme after following due procedure prescribed under the Act, sale of reconstituted plot No.95 by respondent No.6 to the petitioner, etc., are not at all in dispute. The only ground for issuing impugned notice dated 14.8.1995 by the Collector is that though some Government lands were included in the Town Planning Scheme and yet no reconstituted plots in lieu thereof have been allotted to the Government and it appears that the Government land has been included in the

reconstituted plots allotted to respondent No.6 and consequently, as alleged, the entire proceedings under the Act for allotment of reconstituted plots in favour of the petitioner is illegal, the mutation entry made in favour of the petitioner is required to be cancelled and set aside and possession of the plot is also required to be taken by the Government.

While assailing legality of the impugned notice on various grounds, the principal contention is about lack of jurisdiction of Collector to issue such notice and as the notice is without jurisdiction same is nullity in the eyes of law and cannot be implemented.

It is not in dispute that plot in question is covered under Town Planning Scheme and is a reconstituted plot with final plot Number. The Town Planning Scheme has already been sanctioned and thus has become final. It is also not in dispute that the supreme authority under the Town Planning Act is the Appropriate Authority. In this case, the Appropriate Authority had made declaration of intention to make scheme followed by publication of draft scheme. While publishing draft scheme the Appropriate Authority did give complete details as required under Section 44 of the Act followed by reconstitution of plots as provided under Section 45 and settlement of disputed ownership under Section 46 of the Act. Apart from the settlement of disputed ownership, the scheme also contemplates inviting objections under Section 47 from the interested parties. Having undergone these process, the draft scheme would stand sanctioned as provided in Section 48 of the Act. Then comes the role of Town Planning Officer appointed under Section 50 of the Act who shall divide Town Planning Scheme into preliminary and final scheme, publish the same under Section 52 (1) of the Act. As provided in sub Section (3) of Section 52, Town Planning Officer shall determine value of original and reconstituted plots and also decide the question of reservation for public purpose, estimate the portion of the sums payable as compensation on each plot used, allotted or reserved for a public purpose, calculate the contribution to be levied and to decide all other ancillary questions/disputes. The Town Planning Officer is empowered to decide the disputes and matters arising under Section 52 and such decisions are made final as provided in Section 53 read with Section 62 of the Act, of course, subject to appeal under Section 54 of the Act and thus the preliminary scheme so prepared and finalised is subjected to the Government sanction and on according sanction, preliminary scheme or final scheme, as the case may be, shall have effect as if were enacted

under this Act. Before finalising and sanctioning the scheme, law also provides for meeting of owners and framing of tentative proposals under Rule 17 of the Gujarat Town Planning & Urban Development Rules, 1979 (hereinafter referred to as "the Town Planning Rules"), inviting objections within one month from the date of publication from the affected persons under Rule 18 (2) followed by redistribution of plots, preparing valuation statement in Form F showing the estimated amounts to be paid to or by each of the owners included in the scheme as per Rule 21 (v) of the Town Planning Rules. Rule 26 of the Town Planning Rules casts obligation upon the Town Planning Officer to give notice to the owner of any property or right, which is injuriously affected by making Town Planning Scheme and such owner shall be entitled to claim compensation under Section 82 of the Town Planning Act in respect of property or right injuriously affected by the Scheme.

The Act itself is a self-contained Code providing for implementing the scheme and redressal of grievance of aggrieved parties. The Act also bars jurisdiction of Civil Court to decide any dispute arising under the scheme. The aggrieved party can take recourse to the procedure provided and the decision of authority under the scheme becomes final.

In this case, it is evidently clear that Collector has issued the impugned notice in the capacity as owner of Government land raising dispute about not allotting land in lieu of Government land included in the scheme. Thus, the right of Government as an owner is adversely affected for redressal of which separate procedure is provided. In this case the Government as owner did not raise any dispute or objection at any stage between publication of draft scheme to sanction as provided under Rule 18 (2) or 26 (4) of the Rules. Thus shall be deemed to have waived rights of raising any objection as contemplated under the Act and since the scheme has already been sanctioned having force of law under Section 65 (3) the Government as owner is estopped from raising any dispute as regards redistribution since by virtue of Section 67, all the lands vest in authority free from encumbrances only remedy would be to go for compensation. Thus, Government as owner is also statutorily estopped from raising such a dispute at this stage.

As per the Scheme of the Act, on transfer of land to the authority referred to above, the Collector is no more an authority under the Act, and thus is not empowered to initiate any proceedings or decide the same. Qua the

scheme Collector is also one of the owners of the lands included in the scheme. The authority under the Act is either the Appropriate Authority or the Town Planning Officer, who are empowered to decide any matter or dispute or objection raised by any of the owners of property or rights which are adversely affected by the Scheme. Therefore, in my view, the impugned notice issued by the Collector would be without jurisdiction.

Apart from all these facts, the Act provides for payment of compensation under Section 82 in respect of the property or right injuriously affected by the scheme, therefore, if at all any owner of property feels that his right or interest is injuriously affected, can raise objection and make claim for compensation but nonetheless can insist for cancellation of redistribution of plots which has already been finalised and sanctioned. It is needless to say that moment preliminary scheme comes into force, all lands required by the Appropriate Authority under the scheme shall vest in the Appropriate Authority free from all encumbrances subject to the rights to be settled by the Town Planning Officer. In this case also since the draft scheme was followed by preliminary scheme which was followed by final scheme and ultimately sanctioned by Government, the rights of Government as an owner of property covered under the Scheme stood determined the day on which the preliminary scheme came into force. Consequently, the Collector, respondent No.2, as owner has no right to lay hands on a particular piece of land claiming as Government's land and initiate proceedings on his own. An ordinary owner has no rights to initiate such proceedings. This is just by coincidence that the Collector enjoys dual status - as owner and as statutory authority. His said statutory authority has no recognition under the Town Planning Scheme.

As evident from the Annexure 'F', the rights of the owners and interested persons had already been decided either by paying them compensation for the loss/damages sustained or calling upon them to pay the amount of compensation and increment in lieu of gain or appreciation of property. Hence, now as an owner, Collector has no right to raise any dispute.

It is true that the impugned notice is a show cause notice only, therefore, it is always open to the aggrieved party to appear before the authority and file appropriate reply. Issuance of show cause notice simpliciter does not take away or affect any of the

vested rights. Thus, learned A.G.P. Mrs. Parekh, has argued that the petition is premature and not maintainable. The learned Senior Counsel for the petitioner, Mr. V.B. Patel has argued that the show cause notice without jurisdiction would be abinitio void and nullity and cannot be acted upon. A show cause notice without jurisdiction is permitted to be acted upon then all further proceedings would also be without jurisdiction which is not permissible under law. Relying upon the judgment of the Supreme Court in the case of East India Commercial Company v. Collector of Customs, AIR 1962 SC 1893, Mr. Patel has argued that the Court is competent to issue appropriate writ in case where show cause notice is without jurisdiction. Even this Court also in the case of Motiben Somaji v. State of Gujarat, 1996 (2) GLH, 22, has taken similar view holding that show cause notice without jurisdiction is contrary to law and can be interfered with under Articles 226 and 227 of the Constitution, if it is patently illegal. On this contention, Mr. Patel has also relied upon the judgments rendered by the Supreme Court in the case of Calcutta Discount Co. v. Income Tax Officer, AIR 1961 SC 372, Union of India v. Jain Shudh Vanaspati, (1992) 3 SCC 510 and in the case of Union of India v. Brij Fertilizers Pvt. Ltd. (1993) 3 SCC 564.

While referring to the need of challenging the show cause notice, Mr. Patel has also argued that even if an order is without jurisdiction or not made in good faith, still, is a legal order and can be implemented because it does not bear any brand of invalidity upon its forehead consequently unless such order is held as invalid by a competent authority will remain in force. It is true that validity and legality of an order is to be declared by an authority under law and till such event occurs, the same would remain in force and, if implemented, may result into grave injustice and cause immense prejudice. Therefore, such order should pass through the legal test and deserves to be examined. In support of his contention, he has referred to a paragraph from the book of 'Administrative Law', Seventh Edition, by H.W.R. Wade & C.F.Forsyth, which reads as under:

> "An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

As an alternative ground of assailing the impugned notice, learned Senior counsel Mr. Patel for for the petitioner, has submitted that even assuming that the respondent - Collector has power to issue impugned notice under Rule 108, it shall be subject to some limitations as per the power of revision under Section 211 of the Bombay Land Revenue Code (hereinafter referred to as 'the Code' for short). Section 211 of the Code empowers Government and certain revenue officers to call for and examine the record of any inquiry or the proceedings of any subordinate revenue officer in exercise of suo motu revisional powers. Since the law does not provide for period of limitation, the same has to be exercised within reasonable period. The question of reasonable cause to be examined by the Supreme Court in the case of State of Gujarat v. Raghav Natha, X, GLR 992. As per this decision, reasonable period would be of three months for exercise of powers under Section 211 of the Code. While laying down this principle, the Supreme Court has laid a word of caution that length of reasonable time must be determined on the facts of individual case and nature of impugned order. Relying upon this ratio, this Court in the case of Janardan D. Patel v. State of Gujarat, 1997 (1) GLR 50, has held that reasonable period would be of one year for exercise of revisional powers under section 211 of the Code. The question of reasonable period within which suo motu powers invoking revisional jurisdiction of powers are to be exercised was also subject matter of the decision in the case of Evergreen Apartment Co-op. Housing Society Limited v. Special Secretary (Appeals), Revenue Department, 1991 (1) GLH 155 and the Court held that such powers exercised after unreasonable delay are illegal, arbitrary and bad in the eyes of law. In this case, admittedly, the preliminary scheme came into force on 5.10.1989 and was sanctioned on 28.6.1990. Thus, on coming into force of the preliminary scheme, rights of individual owner of the lands covered under the scheme had already been determined. The rights so conferred by scheme and vested in petitioner have now been challenged by respondent No.2 by the impugned notice dated 14.8.1995, that is, after a period of six years. Thus, one can safely hold that the respondent No.2 Collector has exercised suo motu revisional powers after unreasonable delay as a result of which, on the face of it, such powers would be arbitrary, illegal and bad in law and requires to be quashed.

On the question of limitation, learned A.G.P. Mrs. Parekh has referred to the decision of the Supreme Court in the case of State of Orissa v. Brundaban Sharma, 1995

Supp (3) SCC 249. It was a matter arising under the Tenancy and Land Laws. The order passed by the Board of Revenue quashing the order of Tehsildar after 27 years was held to be valid and legal. The question before the Supreme Court was not about the period of limitation during which validity and legality of an order can be examined but the question was about effect of a nonest order which was void abinitio and it was held by the Court that validity of a nonest order can be questioned in any proceeding at any stage. The Court also held that for entertaining revision, no period of limitation is prescribed under the Act but the same should be exercised within a reasonable time. In my view, the ratio has no application, on facts, to the case in hand.

Mr. Patel, learned Senior Counsel, has also argued that by issuing impugned notice under Rule 108 (6) of the Rules the respondent No.2 intends to divest the petitioner of legal title and possession qua the plot which has been statutorily conferred upon him. The scope of Rule 108 of the Rules is to deal with entries made in the record of rights and dispute regarding legality of such entries. As held by the Supreme Court in the case of Sankalchan Jaychandbhai Patel v. Vithalbhai Jaychandbhai Patel, (1996) 6 SCC 433, mutation entries do not create any title to the property since such entries are only to enable the State to collect revenues from the persons in possession and enjoyment of the property. The right, title and interest as to the property should be established independent of the entries. Thus, it is clear that the entries in the revenue records are for the fiscal purpose only and while exercising powers under Section 108, the Collector has no power to divest the petitioner of his legal title vested by statute i.e., Town Planning Scheme. It is settled law that one cannot be divested of his legal title merely by virtue of deciding mutation entries. As held by the Supreme Court in the case of State of M.P. v. Smt. Shiv Kunwarbai, AIR 1971 SC 1477 there must be some positive evidence to deprive a person of his legal inheritance or title. It must also be shown by irreproachable evidence that the person in possession ceased to have any interest therein at a particular point of time and that by some process of law the property vested in the person seeking to eject the former lawful possessor. Similarly, if a person has been legally invested with the possession, the revenue authorities in exercise of suo motu revisional powers under Section 211 of the Code cannot decide the disputed question of title to any property. Mutation proceedings cannot be converted into proceedings for deciding question of title since question of title has to be

decided by a competent Court of civil jurisdiction. If revenue authority intends to decide question of title in revenue proceedings, in my view, would be usurping jurisdiction of Civil Court as held by this Court in the case of Ratilal Chunilal Solanki v. Shantilal Chunilal Solanki, 1996 (1) GLH 816.

In the case in hands, the controversy centres round the ownership of final plots and by impugned notice the Collector intends to divest the petitioner of possession and legal title by taking recourse to impugned revenue proceedings. Such proceedings are meant for deciding disputed entries only. Hence, in my view, while doing so, the revenue authorities would be usurping the jurisdiction of civil Court. I am fortified by a view taken by the Supreme Court in the Raghav Natha's case (supra) which says that question of title cannot be gone into by revenue authorities while initiating proceedings qua mutation entry. Bombay High Court also in the case of Suleman Hasham Memon v. Kashiram Bhau Patil, LX BLR 1119, has held that the Collector has no power to decide question of title and order summary eviction while exercising revenue jurisdiction.

Learned Senior Counsel Mr. Patel for the petitioner has also drawn my attention to the notice which refers to exercise of powers by the Collector under Sections 37, 61 and 202 of the Code, and has argued that the intention of respondent No. 2 - Collector to issue the impugned notice is to lay foundation to proceedings under these sections. In fact, intention of Collector by initiating the proposed actions is to divest the petitioner of his legal title and possession whereas the scope of inquiry under Sections 37, 61 and 202 of the Code is entirely meant for different purposes. Section 37 of the Code refers to the ownership of public roads, lanes and paths, the bridges, ditches, dikes and fences, on or beside, the same, the bed of the sea and of harbours and creck below high water-mark, and of rivers, streams, nallas, lakes, and tanks, and all canals, and water-courses, and all standing and flowing water and all lands wherever situated, which are not the property of individuals, or of aggregates of persons legally capable of holding property, and except as may be otherwise provided in any law for the time being in force. According to this Section, such property belongs to Government and if there is any dispute same shall be decided by Collector after formal inquiry. Section 61 of the Code refers to summary eviction of unauthorised occupants. Section 202 of the Code contemplates procedure for eviction of any person wrongly in possession of Government lands. In this case,

admittedly, question is not with regard to public roads, lanes, paths, sea-banks, or dispute regarding Government land nor regarding encroachment or eviction of person in unauthorised occupation. The dispute raised is with regard to ownership of property which has already been vested in petitioner by virtue of statute, i.e., the Town Planning Scheme. Thus, even assuming that the respondent No.2- Collector has power to issue impugned notice, the proposed inquiry would be beyond the scope of Sections 37, 61 and 202 of the Code, referred to in that notice, consequently, the impugned notice would also be without jurisdiction from the view point of scope of inquiry under Sections 37, 61 and 202 of the Code. As held by this Court in the case of Aher Naran Vijanand v. State of Gujarat, 1990 (2) GLR 1161, inquiry under Sections 37 (2) and 61 of the Code can be held where title of Government to the plot of land is admitted. In this case, the title itself is in dispute consequently, any inquiry under Sections 37 and 61 would be abinitio void and illegal. Scope of Section 61 has also been discussed by this Court in the case of Harijan Vithalbhai Madhavbhai v. Krishnamurthy, XVII, GLR 525, holding that Section 61 in terms applies to a person who has ceased to be entitled to the use or occupation of the Government land and who thereafter continues to be in occupation thereof. In this case, admittedly, the petitioner was/is never in possession of Government land and/or his authority to be in possession has ever ceased consequently, the Collector, respondent No.2, would not be justified in issuing impugned notice and in holding such inquiry.

Mrs. Parekh, the learned A.G.P. has also challenged the locus standi of the petitioner to file the present petition since the notice is issued in the name of original owner, respondent No.6. It is true that the notice has been issued in the name of respondent No.6, original owner. In fact and even according to the revenue record also, the petitioner is the owner and mutation entries have already been made in his favour, consequently, it is the petitioner only and none else who would be the affected person in relation to the action proposed by Collector vide the impugned notice. Consequently, the petitioner is not only proper but necessary party to decide the rights qua the ownership of land in question. Hence, in my view, the petitioner has locus standi to approach this Court and ventilate grievance by preferring petition as a result of which the contention has no force and is hereby rejected.

Maintainability of petition is also attacked by the

learned A.G.P. Mrs. Parekh contending that a public interest litigation in relation to framing of Town Planning Scheme No.1 and redistribution of plots is pending. Pendency of petition has no effect on the right, title or interest of the petitioner of the land in question which has already vested in the petitioner by virtue of a valid and legal registered sale deed as well as by operation of law and holds good till is not set aside by competent authority.

In the result, petitions are allowed. The impugned notices, Annexure I dated 14.8.1995, in Special Civil Application No. 9602/96, Annexure K dated 23.6.1995 in Special Civil Application No. 9605/96 and Annexure J dated 28.9.1995 in Special Civil Applications No. 9698/96, 9699/96 and 9700/96 are hereby quashed and set aside. The concerned Mamlatdar is directed to give effect to the mutation entries referred therein. Order of status quo stands vacated. Rule is made absolute accordingly. No order as to costs.